No. 86 1542

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

H. DEAN OLSON, et al., Petitioners,

v.

GLENNELL EXKANO, et al, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PARTIES TO PROCEEDINGS BELOW

Glennell Exkano, Sandie Sotherd and Patricia Conway, respondents herein, filed this class action in the United States District Court for the Western District of Washington. Respondents' motion for class certification is pending.

Petitioners are H. Dean Olson, director of the King County Department of Adult Detention, which department operated the King County Jail; Randy Revelle, King County Executive; Harry Thomas, Deputy King County Executive; Raymond J. Coleman, Deputy Director of the King County Department of Adult Detention and Jail Commander. All were defendants below, together with fictitious King County corrections officers and administrators.

Petitioners Olson, Revelle and Thomas no longer are connected with King County government. Also named as defendants below, but not parties to this petition, are the City of Seattle; Patrick Fitzsimons, the City of Seattle Chief of Police; and fictitious City of Seattle police officers and administrators.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

H. Dean Olson, Randy Revelle, Harry Thomas and Raymond J. Coleman, all

appointed and elected officials of King County, Washington, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the Court of Appeals which is the subject of this petition (App. A, infra) is not reported (No. 86-3723). The order of the District Court (App. B, infra) is not reported (No. C85-1514V).

JURISDICTION

The order of the Court of Appeals granting respondents' motion for summary affirmance was filed on December 29, 1986. Jurisdiction of this court is invoked under 28 U.S.C § 1254(1).

STATUTORY PROVISION INVOLVED

The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisidiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

In February of 1983, a class action was filed in the United States District Court, Western District of Washington under 42 U.S.C. § 1983 attacking the policy of the King County Jail of routinely strip-searching all persons who were arrested and brought to the King County Jail, except for persons released prior to the completion of the booking process. That case was entitled Shirley M. Grew v. King County, et al., Cause No. C83-157V (W.D. Wash. 1983). On May 20, 1983, the court in Grew heard cross-motions for summary judgment and a motion for preliminary injunction on the issue of constitutionality of the strip-search procedure. The court in its oral ruling (App. C, infra), denied the motions for summary judgment but orally

indicated that it would grant plaintiffs' motion for a preliminary injunction and delineated general guidelines for determining under what circumstances strip-searches would be permissible at the King County Jail. The court then directed plaintiffs' counsel to prepare an order and, if possible, obtain agreement as to its language. No proposed preliminary injunction was ever presented to the court. Instead, a sequence of negotiations occurred, culminating on November 15, 1983 with the entry of a stipulated permanent injunction (App. D, infra), which delineated the circumstances under which strip-searches could be conducted in the King County Jail as to all inmates presented to the jail for booking and incarceration.

While the Grew negotiations were continuing, on July 15, 1983, respondent Exkano was arrested by Seattle Police Department officers because of three outstanding Seattle Municipal Court traffic violation warrants. On July 24, 1983, respondent Sotherd was arrested by Seattle Police Department officers, because of an outstanding warrant in connection with a traffic violation. On July 15, 1983, respondent Conway was arrested by officers of the King County Department of Public Safety and detained by them on charges of driving while intoxicated and having no operator's license on her person. All three respondents were taken to the King County Jail and booked there at the request of the arresting agencies. All three respondents were interviewed and

subsequently released on personal recognizance after a total stay in the jail of between three and four hours. All three respondents allege that they were strip-searched by employees of the King County Department of Adult Detention. Pursuant to the policy then in place at the King County Jail the strip search occurred as part of a clothing exchange and transfer into the general jail population.

This action was filed on July 12, 1985, and was brought under the Civil Rights Act of 1871, 42 United States Code Section 1983. It includes booking, detention and release issues, which are not part of this appeal. As to the strip search issues, respondents seek declaratory relief, compensatory and punitive damages for such searches

individually and on behalf of a class of persons subjected to routine booking strip searches at the King County Jail between May 20, 1983, and November 15, 1983.

On November 14, 1985, petitioners moved for partial summary judgment on the strip search issues asserting qualified immunity. On January 2, 1986, petitioners moved for partial summary judgment on the booking, detention and release claims asserting qualified immunity. On March 17, 1986, the trial court entered an order (App. B, infra) denying the petitioners' motion for partial summary judgment on the strip search claims, granting petitioners' motion for partial summary judgment on the booking claims and dismissing respondents' damage claims for unlawful

detention, false imprisonment and negligent infliction of emotional distress. Petitioners appealed. Respondents moved for summary affirmance on July 29, 1986 which was granted by the appellate court on December 29, 1986 (App. A, infra). The sole grounds cited by the appellate court in support of its order granting summary affirmance was Ward v. County of San Diego, 791 F.2d 784 (9th Cir. 1986). That case, under the title John F. Duffy, Petitioner v. Judith A. Ward, Respondent, No. 86-815, is currently pending before this Court on a petition for writ of certiorari. Questions regarding constitutionality of the strip searches are no longer

at issue.[1] The only issues presented here relate to petitioners' claim for qualified immunity.

EXISTENCE OF JURISDICTION BELOW

The District Court had jurisdiction over the Federal Civil Rights Claim under 28 United States Code Section 1343(3).

REASON FOR GRANTING THE PETITION

1. The Appellate Court Has Effectively Reversed Qualified Immunity Principles Enunciated By This Court By Requiring Officials To Anticipate Future Legal Developments, Establish Authority Approving Their Actions And Weigh Conflicting Precedent.

During the period in question, petitioners were employees of the King

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[1] In 1986, the Washington State Legislature adopted nearly verbatim the language of the stipulated permanent injunction entered in Grew, supra, as Chapter 88, Laws of 1986.

County Department of Adult Detention vested with responsibility for operation of the King County Jail or were executive officials, whose involvement is alleged on the basis of their general supervisory responsibility for the operation of King County government. They are entitled to qualified immunity from liability for damages under the Civil Rights Act, pursuant to the principles enunciated by this Court in a series of cases beginning with Harlow v. Fitzgerald, 457 U.S. 800 (1982). The basic test for determining the availability of qualified immunity was described by this Court in Harlow as follows:

> "We . . . hold that government officials performing discretionary functions generally are shielded from

> liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (457 U.S. at 818.)

The standard to be used is wholly objective. In describing the appropriate analysis to be used by the trial court, the Court in Harlow stated as follows:

> "On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time the action occurred. If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." (457 U.S. at 818.)

The trial court in this case denied petitioners' motion for partial summary judgment on the issue of qualified

immunity in large part based on the authority of Ward v. County of San Diego, supra. (App. B. infra, B-4 & 5.) The appellate court affirmed that decision solely on the basis of Ward. (App. A., infra). Petitioners believe that Ward fundamentally misinterpreted the principles applicable to qualified immunity in civil rights cases and further, that a blanket application of Ward to the instant case compounds that error and requires resolution by this court on certiorari.

The plaintiff in Ward was arrested on May 30, 1981 for the misdemeanor offense of refusing to sign a promise to appear. She was booked and required to submit to a strip search. She sued the County of San Diego and its sheriff, John Duffy, for violation of her Fourth

Amendment rights under 42 U.S.C. § 1983. The district court granted Duffy's motion for summary judgment, holding that the law was not clearly established at the time of the strip search and, therefore, Duffy enjoyed qualified immunity. The Ninth Circuit Court of Appeals reversed, based primarily on its prior interpretation of Harlow's "clearly established" rights standard in Capoeman v. Reed, 754 F.2d 1512 (9th Cir. 1985). The court concluded that where, as here, no binding precedent exists, a two-part analysis is required for determination of whether the law was clearly established. First, "the court should look to whatever decisional law is available to ascertain whether the law is clearly established under the Harlow test". 791 F.2d at 1332. It is

the second part of the analysis adopted by the court in Ward which fundamentally misinterprets the standards for determining qualified immunity enunciated by this Court. The analysis is more fully set out in Capoeman, supra, and states as follows:

> "[W]here . . . there are relatively few cases on point, and none of them are binding, an additional factor which may be considered in ascertaining whether the law is 'clearly established' is a determination of the likelihood that the Supreme Court or this circuit would have reached the same result as courts which had previously considered the issue. To make the determination, we examine the legal analysis employed by those courts and compare it to the analysis being used at that time by the Ninth Circuit in related but factually different situations." 754 F.2d at 1515).

This approach necessarily requires public officials to anticipate, indeed

speculate, as to subsequent legal developments. The correctness of that anticipation can only be demonstrated by ultimately being proven, not reasonable, but correct.

The remainder of the opinion in Ward clearly demonstrates that the appellate court has emasculated Harlow. The cases cited overwhelmingly uphold strip searches, but remarkably, the court's approach converts them into negative authority, because they did not specifically uphold or address the specific type of strip searches conducted, as here, for security purposes incident to incarceration. As of the date of the actions in Ward, only two reported cases existed addressing

the issue of such strip searches: the first, Logan v. Shealy, 500 F. Supp. 502 (E.D. Vir. 1980), rev'd, 660 F.2d 1007 (4th Cir. October 1981), cert. denied, 455 U.S. 942 (1982) upheld the routine search of a person arrested for driving while intoxicated and held for four hours. The other, Tinetti v. Wittke, 479 F. Supp. 486 (E.D. Wis 1979), aff'd 620 F.2d 160 (7th Cir. 1980) found unconstitutional a strip search of a person arrested for a non-misdemeanor traffic violation who was unable to post a $40 cash bond.

The appellate court in Ward also cited the fact that the District Court had granted plaintiff's motion for preliminary injunction and that the one existing case arguably on point which did not uphold strip searches, Tinetti,

supra, together with the cases that did uphold them, "harbinged" the court's subsequent decision in Giles v. Ackerman, 746 F.2d 614, 619 (9th Cir. 1984) in which the Ninth Circuit did determine that strip searches of arrestees for minor offenses were unconstitutional absent individualized suspicion that such arrestees were carrying or concealing contraband or suffering from a communicable disease.

Both the injunction and Giles occurred well after the actions in Ward. They are noted by the appellate court as further evidence that the public officials in Ward should have anticipated subsequent legal developments and are to be held personally liable for not doing so.

Roughly two years separate the actions at issue in Ward and the actions in this case, which occurred in July of 1983. There were no Supreme Court or Ninth Circuit decisions which ruled on the constitutionality of routine strip searches incident to incarceration. Of the opinions cited by the trial court in this case (App. B, infra, B - 4 & 5), Tinetti v. Witke, supra, has been discussed above. Logan was reversed at the appellate level, but even then made no definitive statement about who could be strip searched and under what circumstances. Instead it applied a balancing test and criticized the strip search policies specifically applied to plaintiff Logan, who was booked for driving while under the influence, strip searched and released without being

transferred to the general jail population. Essential to the court's decision was the fact that at no time during her incarceration would Logan have intermingled with the general jail population. No such situation exists in this case. Plaintiffs were searched preliminary to their transfer to the general jail population and, therefore, Logan can be distinguished.

The trial court also cited Does v. City of Chicago, 79-C-789 (N.D. Ill. January 12, 1982), affirmed sub nom., Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983). This case cannot be deemed of significant precedential value under the rules enunciated in Harlow, because the trial court decision was unpublished and the appeal was not decided until November

29, 1983, as modified after rehearing on January 20, 1984. Both dates are significantly after any relevant time periods in this action. The trial court also cited Hunt v. Polk County, 551 F. Supp. 339, 344-345 (S.D. Iowa 1982). In Hunt, decided on November 12, 1982, the district court did hold that strip searches of a temporary pre-arraignment detainees charged with minor offenses not normally associated with weapons or contraband were permissible only if there was a basis for reasonable suspicion that the particular detainee was concealing a weapon or contraband. On the other hand, the court failed to cite Roscom v. City of Chicago, 570 F. Supp. 1259 (N.D. Ill. 1983) in which a

strip searched during processing at the jail. The district court held that the procedure was constitutional in light of the decision of Bell v. Wolfish, 441 U.S. 520 (1979).

Most importantly, the only reported case in the Ninth circuit which involved strip searches of the type at issue here upheld the practice. In Giles v. Ackerman, 559 F. Supp. 226 (D.C. Idaho 1983), rev'd 746 F.2d 614 (9th Cir. 1984), the trial court upheld as constitutional a policy virtually identical to the policy that was in place in the King County Jail. The trial court relied directly on Wolfish in rendering its decision. Even though Giles was subsequently overruled in 1984 by the Ninth Circuit, its very existence confirms that in the Ninth Circuit the

law was not clearly established at the time of the searches. Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806 (1985).

The trial court here, following Ward, determined that Giles was an "intervening" decision, without the "necessary precedential value" to change the clearly established law. (App. B. infra B-5). The result of the trial court's analysis and Ward is that petitioners are required to establish affirmative authority in support of their actions and to weigh competing, incomplete or inconsistent precedents. These requirements are unreasonable, unworkable and violative of the principles set forth by this Court in Harlow and most recently, Mitchell v. Forsyth, supra.

The trial court also referenced its oral ruling in Grew, supra (App. C, infra), as clearly indicating to petitioners that their search policy was unconstitutional (App B, infra, B - 5 & 6). The specifics of that ruling were not established until November 15, 1983, well after the actions at issue here, when the court entered a stipulated permanent injunction (App. D, infra) which set out in detail who would be strip searched and under what circumstances. Prior to that date, no injunction was issued, nor was a proposed preliminary injunction even filed by plaintiffs with the court. An injunction becomes effective and a party becomes bound thereby only upon entry of

a written order. Beukema's Petroleum Co. v. Admiral Petroleum Co., 613 F.2d 626 (6th Cir. 1979); Herschensohn v. Hoffman, 593 F.2d 893 (9th Cir. 1979); Fed. R. Civ. P. 65 (d). Prior to entry of the written injunction, petitioners could not reasonably be held obligated to anticipate what policy the court would approve and the opposing parties would accept. Again, petitioners are placed in the impossible position of having to anticipate future legal developments before the outcome is clear or any legal obligation has attached in order to avoid individual liability.

No settled body of law with regard to the strip search policies at issue here was available at the time of the actions at issue here or prior to modification of the King County Jail

search policy on November 15, 1983. Certainly the degree of clarity required by this Court does not emerge from the inconsistent and diverse opinions available at the time. In fact, the opinions continue to be inconsistent. Aside from Ward, since mid-1983 qualified immunity has been granted jail or prison officials and security and law enforcement employees in the following cases; District 82 v. Carey, 737 F.2d 187 (2nd Cir. 1984), John Does 1 through 100 v. Ninneman, 612 F. Supp. 1069 (D.C. Minn. 1985); John Does 1 through 100 v. Boyd, 613 F. Supp. 514 (D.C. Minn. 1985); and Fann v. City of Cleveland, 616 F. Supp. 305 (D.C. Ohio 1985). Qualified immunity was denied by the 8th Circuit Court of Appeals in Jones v. Edwards, 770 F.2d 739 (8th Cir. 1985).

Most recently, the Ninth Circuit granted qualified immunity to Los Angeles police officials in Kirkpatrick v. City of Los Angeles, 803 F.2d 485 (9th Cir. 1986). In that case, strip searches conducted on police officers in 1981 were held to be unconstitutional without the existence of reasonable suspicion. Surveying the law in that case, where, as here, no definitive decision existed, the appellate court reviewing many of the same cases and using the same analysis, came to the opposite conclusion, and upheld qualified immunity.

The way out of this maze is shown by this Court's decision in Mitchell v. Forsyth, supra, a case not cited by the appellate court in Ward and although cited, not followed by the trial court

here. In Mitchell, this Court granted immunity to then-Attorney General of the United States John Mitchell for having ordered domestic security wiretaps while their legality was still in question. The lower courts used reasoning very similar to that used in Ward and here. In response, the Court stated:

> "The District Court's conclusion that Mitchell is not immune because he gambled and lost on the resolution of this open question departs from the principles of Harlow. Such hindsight-based reareasoning on immunity issues is precisely what Harlow rejected. The decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted." (105 S. Ct. at 2820.)

The appellate court's decision in Ward and by extension this case engages in and is dependent upon such "hindsight-

based reasoning". As a result, the availability of qualified immunity for petitioners does not depend solely upon the objective reasonableness of their conduct as measured by reference to clearly established law, which has been required by this Court in Harlow, reiterated in Davis v. Scherer, 104 S. Ct. 3012 (1984) and implemented in Mitchell. Instead, petitioners must anticipate the course of subsequent legal developments. Petitioners must find positive authority validating their actions. Finally, petitioners must weigh the "precedential value" of conflicting opinions. The appellate and trial court decisions herein effectively reverse the principles set forth by this Court regarding qualified immunity and the public policy considerations

reflected therein. As a practical matter, it eliminates the availability of the qualified immunity defense to petitioners and other similarly situated public officials except where the clearest possible authority exists validating their actions or, to paraphrase Justice White, writing in Mitchell, where they have gambled and won. (105 S. Ct. at 2820.)

II. The Decision Of The Appellate Court Allows A Public Official To Be Individually Liable For Actions Which Violate No Constitutional Or Statutory Rights.

Petitioners were denied qualified immunity as to all of respondents' claims, including class based claims on behalf of all persons who were arrested, booked into the King County Jail and strip searched from May 20, 1983, to

November 15, 1983, on charges other than (a) violent offenses as defined in RCW 9.94A.030(26);[2] (b) offenses involving

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[2] RCW 9.94A.030(26) defines violent offenses as "(a) any of the following felonies, as now existing or hereafter amended: any felony defined under any law as a class A felony or attempt to commit a class A felony, criminal solicitation of or criminal conspiracy to commit a class A felony, manslaughter in the first degree, manslaughter in the second degree, indecent liberties if committed by forcible compulsion, rape in the second degree, kidnapping in the second degree, arson in the second degree, assault in the second degree, extortion in the first degree, robbery in the second degree, vehicular homicide and vehicular assault; (b) any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a violent offense in subsection (26)(a) of this section; and (c) any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a violent offense under subsection (26)(a) or (b) of this section."

burglary or use of a deadly weapon, or (c) offenses involving possession of a drug or other controlled substance under Chapter 69.50 RCW, the "Uniform Controlled Substances Act".

In affirming the trial court's order, the appellate court's decision has rendered petitioners potentially liable for strip searching persons charged with more serious offenses, gross misdemeanors and felonies. The effect of the appellate court's decision here and in Ward would hold these petitioners individually liable for the routine strip searching of persons concerning whom such searches have been found constitutional. See Dufrin v. Spreen, 712 F.2d 1084 (6th Cir. 1983). It would also include persons arrested on charges commonly associated with

contraband or persons who had been found actually attempting to smuggle contraband into the jail in the past. There is no authority whatsoever for the remarkable proposition that the law in 1983 was "clearly established" prohibiting routine strip searches of individuals into local jail facilities on charges more serious than traffic offenses or minor misdemeanors. Giles v. Ackerman, supra at 746 F.2d 614. Such a result effectively dismantles qualified immunity as a meaningful defense, because it allows class-based liability to attach to actions by public officials which cannot be shown to violate an individual's constitutional or statutory rights.

CONCLUSION

The qualified immunity principles at issue here address important questions of federal law and public policy. The availability of qualified immunity for local government officials is vitally important if the fabric of local decision making is to be maintained. As interpreted below and in conflict with the prior pronouncements of this Court, qualified immunity is not meaningfully or reasonably made available to such local government officials. The decisions of the appellate court in Ward and by affirmance here will have a chilling effect on such officials and their ability to decide and act. This

petition for certiorari should be granted.

DATED this 17th day of March, 1987.

Respectfully submitted,

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APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GLENNELL EXKANO, et al., Plaintiffs/Appellees, v. KING COUNTY, WASHINGTON, et. al., Defendants/Appellants.	No. 86-3723 DC# CV-85-1514-V Western Washington (Seattle) ORDER

Before: CANBY, REINHARDT and THOMPSON, Circuit Judges

Plaintiffs' motion for summary affirmance is granted. Ward v. County of San Diego, 783 F.2d 1385, 791 F.2d 1329 (9th Cir. 1985).

Appendix B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GLENNELL EXKANO, et al.,	)	
	)	
Plaintiffs,	)	NO. C85-1514V
	)	
v.	)	ORDER
	)	
KING COUNTY, WASHINGTON, et al.,	)	
	)	
Defendants.	)	
	)	

Having considered the motion of defendants Randy Revelle, Harry Thomas, H. Dean Olson, Raymond J. Coleman, and fictitiously-named King County Corrections officers and administrators

(collectively "the King County defendants") for partial summary judgment on plaintiffs' strip search claims and the motion of King County defendants for partial summary judgment on plaintiffs' booking claims, together with the memoranda and affidavits submitted by counsel, this Court now finds and rules as follows:

1. On July 15, 1983, plaintiffs Glennell Exkano and Patricia Conway were arrested on warrants for traffic violations. On July 24, 1983, plaintiff Sandie Sothard was arrested for a traffic violation. All of the plaintiffs had similar experiences after their arrests. They were taken to King County Jail where they were strip searched and booked. Plaintiffs claim that the searches took place either in

rooms which had no doors or rooms the doors of which were open. In addition, plaintiffs allege that, because of the nature of their offenses, it was likely that they would be released from custody soon after their arrests.

2. Plaintiffs Exkano and Sothard allege certain additional facts with respect to the booking and bail procedures at the jail. Exkano claims that her bail was set at $303.00. She further claims that at the time of her arrest she was carrying over $480.00 in cash. She claims that she asked to post bail but was not permitted to do so. After a period of detention, Exkano was released from the jail.

3. Plaintiff Sothard asserts that her bail was set at $100.00. She further contends that she was carrying

$390.00 at the time of her arrest. She claims that at no time during her stay at the King County Jail did any jail officer inform her of a right to post bail. After a period of detention, Sothard was released from the jail.

4. The plaintiffs have filed this action under 42 U.S.C. Section 1983. They allege that the defendants violated the United States Constitution when they conducted the strip searches. Plaintiffs Exkano and Sothard bring claims regarding the jail's booking and bail procedures. The requested relief includes damages against the defendants in their individual and official capacities as well as injunctive and declaratory relief.

5. The King County defendants have moved for partial summary judgment on

the damage claims brought by plaintiffs against them. They claim that they enjoy qualified immunity from personal liability to plaintiffs under 42 U.S.C. Section 1983.

6. The plaintiffs have agreed to dismiss all damages claims arising from their booking and detention at King County Jail. In consequence, the King County defendants' motion for partial summary judgment on the booking claims should be granted.

7. When they are performing discretionary duties, government officials enjoy qualified immunity to claims under 42 U.S.C. Section 1983 so long as their conduct does not violate clearly-established statutory or constitutional rights which would be known to a reasonable person. Harlow v.

Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). In the present case, the availability of this defense with respect to the strip search claims depends upon whether there was clearly-established law which forbade routine strip searches for minor offenses at the time of the strip searches of plaintiffs. Mitchell v. Forsyth, ___ U.S. ___, __, 86 L. Ed. 2d 411, 428, 105 S. Ct. 2806 (1985).

8. At the time that plaintiffs were strip searched, there were no Supreme Court or Ninth Circuit decisions which had ruled on the constitutionality of routine strip searches of those arrested for traffic offenses. There were, however, outside this judicial district, a number of courts, including two United States Circuit Courts of Appeal, which

had held that routine strip searches of arrestees were unconstitutional. See, Tinetti v. Wittke, 479 F. Supp. 486 (E.D. Wis. 1979), aff'd, 620 F.2d 160 (7th Cir. 1980); Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981), cert. denied, 455 U.S. 942 (1982); Does v. City of Chicago, No. 79-C-789 (N.D. Ill Jan. 12, 1982), aff'd sub nom. Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983); Hunt v. Polk County, 551 F. Supp. 339, 344-45 (S.D. Iowa 1982).

9. In a recent opinion which considered the availability of the qualified immunity defense to damage claims arising from routine strip searches, the Ninth Circuit laid down the following guidelines for determining whether it was clearly established that

routine strip searches were unconstitutional:

> [I]n the absence of binding precedent, a court should look at all available decisional law including decisions of state courts, other circuits, and district courts to determine whether the right was clearly established. . . . An additional factor is the likelihood that the Supreme court or the Ninth Circuit would have reached the same result as courts that had already considered the issue.

Ward v. County of San Diego, No. 84-6362 (9th Cir. March 3, 1986), slip op. at 5, citing Capoeman v. Reed, 745 F.2d 1512, 1514-15 (9th Cir. 1985). After reviewing the available cases, the Court of Appeals concluded, "[T]he law was sufficiently clear in early 1981 so as to expose a public official who

unreasonably authorized blanket strip searches of minor offense arrestees to civil liability under 42 U.S.C. Section 1983." Id. at 6.

10. Between 1981 and the date of the strip searches at issue in the present case, the United States District Court for the District of Idaho published its decision in Giles v. Ackerman, 559 F. Supp. 226 (D. Idaho 1983), reversed, 746 F.2d 614 (9th Cir. 1984). In that action the district court held that routine strip searches could be justified on the grounds of jail security.

11. Despite the decision in Giles, the law in 1983 was, in this court's opinion, clearly established that routine strip searches were unconstitutional. Ward held that the

law was clearly established in 1981. The intervening district court decision in Giles is without the necessary precedential value to change that clearly established law. In consequence, the law in 1983 was sufficiently clear to subject the King County defendants to liability for civil damages under 42 U.S.C. Section 1983. See, Ward, supra, slip op. at 8.

12. There is the added factor that, before the strip searches of plaintiffs, this Court had conducted a hearing on a motion for a preliminary injunction in Grew v. King County, Cause No. C82-1028V. At the conclusion of that hearing the Court stated that it would issue a preliminary injunction to enjoin routine strip searches at the King County Jail. The Court also stated

at that hearing that there was a very high likelihood that the plaintiffs would prevail on the merits and further that in its opinion a routine strip search was an unreasonable search in contravention of the Fourth Amendment. This ruling on the motion for a preliminary injunction clearly indicated to the King County defendants, who were also defendants in Grew, that their routine strip search policy was unconstitutional. See, Smith v. City of Seattle, Cause No. C84-793R (W.D. Wash. April 5, 1984). In consequence the motion of King County defendants for partial summary judgment on the strip search claims must be denied.

Accordingly, the motion of the King County defendants for partial summary

judgment on the strip search claims is DENIED. The motion of the King County defendants for partial summary judgment on the booking claims is GRANTED, and the damage claims of plaintiffs for unlawful detention, false imprisonment and negligent infliction of emotional distress in paragraphs 5.1, 5.2, and 5.3 of their First Amended Complaint are DISMISSED as against defendants Randy Revelle, Harry Thomas, H. Dean Olson and Raymond J. Coleman in their respective individual capacities.

The Clerk of this Court is instructed to send uncertified copies of this order to all counsel of record.

DATED this 11th day of March, 1986.

DONALD S. VOORHEES
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

JANE DOE, Plaintiff, vs. CLALLAM COUNTY, et al., Defendants.	)	NO. C82-1028V
SHIRLEY GREW, Plaintiff, vs. KING COUNTY, et al., Defendants.	)	

TRANSCRIPT of the Court's Oral Opinion in the above-entitled and numbered cause, heard before the

Honorable Donald S. Voorhees, commencing at 2 o'clock p.m., May 20, 1983.

THE COURT: I am going to deny both of the motions for summary judgment. I think that there are significant material facts at issue that must be decided in a trial on the merits.

However, I am going to issue a preliminary injunction against routine strip searches in Clallam County and King County. I think that this Court is controlled neither by Bell v. Wolfish nor by City of Los Angeles v. Lyons because they are different factual situations. The Wolfish case involved a strip search of jailed inmate after a visit by an outsider, which is not this situation.

The City of Los Angeles involved the use of a choke hold which was not

pursuant to an established city policy, whereas, both in the case of Clallam County and King County there are established policies that everyone who is booked into jail is to be given a strip search.

In Tinetti, as I guess Ms. McKeown started to say, there was a long list of adjectives used in that case. The judge there said that a strip search was demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, and so forth.

I would say this without fear of contradiction, that for many people - not all - but many people, a strip search is a demeaning, humiliating and degrading experience, and the value of a strip search to the jail must be weighed

against the harm or potential harm to the individual who is subjected to it.

Here I feel that on that there is a very high likelihood that the plaintiffs on this injunction issue would prevail on the merits, and applying the other standards that I must with respect to the issuance of a preliminary injunction, I feel that one must issue.

I would feel that on the merits that a strip search is an unreasonable search, that is, a routine strip search is an unreasonable search in contravention to the Fourth Amendment to the United States Constitution. I am very much influenced by the fact that great cities with huge populations such as New York and Chicago and the Metropolitan area of the District of Columbia can get along without

apparently adverse effects upon safety and so forth without strip searches. It seems to me that that indicates that both King County and Clallam County can do likewise, at least until I can hear this on the merits.

The standard that I would impose would not be probable cause, which is a higher standard, but a reasonable suspicion that a strip search is necessary.

The decision to conduct a strip search should be made by a jail official, concurred in by a jail supervisor with articulated reasons for the search. I think the preliminary reason for a search would be security, the thought that there might be a weapon. Even there, though, there are

ways to discover weapons other than by a strip search.

Other reasons for a strip search would be a reasonable suspicion that contraband might be found or a reasonable suspicion that there are health hazards. I would hope that counsel working together can work upon those ideas as to the proper wording of the preliminary injunction.

I would want something said, too, about the nature of the booking. It may be that bookings for certain crimes, strip searches can automatically be made, and in others, primarily misdemeanors where there is a high likelihood the person is going to be released almost immediately or after a very short period of incarceration, the justification for a strip search would be rare.

I am going to ask you, Ms. McKeown, to prepare a proposed preliminary injunction. See if all counsel cannot agree to its wording. If not, bring it to me and I will decide it.

Now, is there anything that I should address myself to that I have not?

MS. McKEOWN: I don't have anything further, Your Honor.

THE COURT: Now, let me say this to you. I am not oblivious or ignorant of the problems that jails have, because I have had many cases before me involving penal institutions, some involving jails, and I know that it's not easy, as was suggested here, for a jailer to decide what to do and what not to do. But many decisions are made by police officers where they have to exercise their discretion, and I think that this

is one of those where jail personnel are going to have to exercise their discretion and just not automatically strip search every time somebody comes into jail.

All right. The briefings were very good and very comprehensive.

(End of proceedings.)

Appendix D

Hon. Donald S. Voorhees

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SHIRLEY M. GREW, VIRGINIA A. MUILENBERG, and BARBARA S. MAGANA, individually and on behalf of all persons similarly situated,	NO. C83-157V
Plaintiffs,	STIPULATED PERMANENT INJUNCTION
v.	
KING COUNTY; RANDY REVELLE, personally and as King County Executive; THOMAS A. JOHNSON, personally and as Commander, Jail Operations, King County Department of Rehabilitative Services, Division of Corrections; OFFICERS DON and DONNA ROE 1-10, and OFFICERS MAX and MAXINE ZOE 1-20, personally and as King County Corrections Officers,	
Defendants.	

THE UNDERSIGNED PARTIES have presented to this Court the following Stipulated Permanent Injunction as a final order in complete resolution of the claim for injunctive relief raised in the above-captioned litigation.

1. Class of Persons to Whom Injunction Applicable. This injunction is applicable to any person in custody at the King County Jail, other than a person committed to incarceration by order of a court, regardless of whether an arrest warrant or other court order was issued before the person was arrested or otherwise taken into custody unless the court issuing the warrant has determined that the person shall not be released on personal recognizance, bail or bond. In no event does this injunction apply to any person held for

post-conviction incarceration for a criminal offense.

2. Definitions of "Strip Search" and "Body Cavity Search". As used in this injunction, the term "strip search" means having a person remove or arrange some or all of his or her clothing so as to permit an inspection of the genitals, buttocks, anus, or undergarments of the person or breasts of a female person. The term "body cavity search" means the touching or probing of a person's body cavity (stomach or rectum, or vagina of a female person), whether or not there is actual penetration of the body cavity.

3. Prohibition on Strip Searches Without "Reasonable Suspicion" or Probable Cause. Defendants, their successors, and their agents and

employees shall not strip search without a warrant any person to whom this injunction is applicable under paragraph 1 unless:

(a) there is a reasonable suspicion to believe that a strip search is necessary to discover weapons, criminal evidence or other contraband, concealed on the body of the person to be searched, which constitutes a threat to the security of the King County Jail;

(b) there is probable cause to believe that a strip search is necessary to discover other criminal evidence concealed on the body of the person to be searched, but not constituting a threat to jail security; or

(c) there is a reasonable suspicion to believe that a strip search is necessary to discover a

health condition requiring immediate medical attention.

4. Categories in Which Searches Automatically Permitted. For purposes of this injunction, such reasonable suspicion, as used in paragraph 3, shall be deemed to be present when the person to be searched has been arrested for:

(a) a violent offense as defined in RCW 9.94A.030(26) or any successor statute,

(b) an offense involving burglary or the use of a deadly weapon, or

(c) a felony offense involving possession of a drug or controlled substance under Chapter 69.50 RCW or any successor statute.

A person who has not been arrested for an offense within one of the categories specified in this paragraph may nevertheless be strip searched, but only

upon an individualized determination of reasonable suspicion or probable cause, as provided below.

5. Individualized Determination in Other Cases. With the exception of those situations in which reasonable suspicion is deemed to be present under paragraph 4, no strip search may be conducted without the specific prior written approval of the ranking jail unit supervisor on duty. Before any strip search may be conducted, reasonable efforts must be made to use other less-intrusive means, such as pat-down, electronic metal detector or clothing searches, to determine whether a weapon, contraband, criminal evidence or a health condition requiring immediate medical attention is present. The determination of whether reasonable

suspicion or probable cause exists to conduct a strip search shall be made only after such less-intrusive means have been used, and shall be based on a consideration of all information and circumstances known to the officer authorizing the strip search, including but not limited to the following factors:

(a) the nature of the offense for which the person to be searched was arrested;

(b) the prior criminal record of the person to be searched; and

(c) physically violent behavior of the person to be searched, during or after the time of arrest.

6. Records to be Kept by Jail. A written record of any strip search shall be maintained in the individual file of

each person searched. With respect to any strip search conducted pursuant to paragraph 5 of this injunction, such record shall contain the following information:

(a) the name of the supervisor authorizing the strip search;

(b) the specific facts constituting reasonable suspicion to believe that the strip search was necessary;

(c) the name and serial number of the officer conducting the strip search and of all other persons persent or observing any part of the strip search;

(d) the time, date and place of the strip search; and

(e) any weapons, criminal evidence, other contraband or health

condition discovered as a result of the strip search.

With respect to any strip search conducted pursuant to paragraph 4, such record shall contain, in addition to the offense or offenses for which the person searched was arrested, the information required by subparagraphs (c), (d) and (e) of this paragraph. This record may be included or incorproated in existing forms utilized by the King County Jail, including the booking form required by WAC 289-14-230(3). A notation of the name of the person strip searched shall also be entered in the log of daily activities referred to by WAC 289-14-230(1) or other chronological record maintained by the King County Jail.

7. Additional Protections. Whenever any strip search is conducted,

the following restrictions, already in effect at the King County Jail, shall be observed:

(a) The strip search shall be conducted only in a private area not exposed to observation by any person not conducting the search.

(b) Except at the request of the person to be searched, no person may be present or observe during the strip search unless necessary to conduct the search.

(c) The strip search shall be conducted or observed only by a person of the same sex as the person to be searched.

(d) The person conducting the strip search shall not touch the person being searched except as necessary to effect the search.

8. Restrictions on Body Cavity Searches. No body cavity search may be conducted except as specifically authorized by a valid search warrant issued by a court pursuant to Rule 2.3 of the Washington Criminal Rules for Superior Court or Rule 2.10 of the Washington Criminal Rules for Courts of Limited Jurisdiction, or any successor statutes or court rules. Any such body cavity search shall be conducted only under hygenic conditions and shall be performed only by a licensed medical professional. The record rquirements of paragraph 6 and the additional protections of paragraph 7 of this injunction shall also be applicable to body cavity searches, except that a body cavity search may be conducted by a licensed medical professional not of the same sex as the person to be searched.

9. Health Quarantine Examinations. Physical examinations conducted by licensed medical professionals solely for health hold quarantine purposes under separate statutory authority of the Seattle-King County Department of Public Health shall not be considered searches for purposes of paragraphs 3 through 8 of this injunction. However, prior to conducting any such physical examination on any person to whom this injunction is applicable under paragraph 1, the person to be examined shall be plainly told, both orally and in writing, that the examination is not a search and is to be performed for health quarantine purposes only, that the examination will be conducted only by a licensed medical professional, and that she or he has a right to refuse consent

to the examination. If the person to be examined does not consent in writing to the examination after being so advised, no examination shall be conducted without specific written authorization from the ranking health department supervisor on duty having legal authority to order involuntary medical examinations for health purposes. In addition, whenever any such examination is performed, the following protections shall be observed:

(a) Except with the approval of the person to be examined, no person may be present or observe during the examination unless necessary to conduct the examination. The examination shall be conducted only in a private area not exposed to observation by any other person.

(b) Other than a licensed medical professional conducting the examination or at the request of the person to be examined, only pesons of the same sex as the person to be examined may be present during the examination.

A written record of any such health quarantine physical examination shall be kept as part of the individual medical or health care records of the person examined and shall include the written consent to the examination required by by this paragraph, the name of the person authorizing the examination and any written authorization for an involuntary examination, the specific facts indicating that an examination is necessary, the name and sex of all persons present during any part of the examination, the time, date and place of

the examination, and the findings of the examination. This record may be incorporated or included in existing forms utilized by the King County Jail and the Seattle-King County Department of Public Health, including health records maintained pursuant to WAC 289-14-230(3)(a) and 289-20-250.

10. Implementation of Injunction. This Court shall retain jurisdiction over the terms and enforcement of this injunction. In any enforcement or modification proceeding subsequent to entry of this injunction, the Court may, in its discretion, award costs and reasonable attorneys' fees to plaintiffs and their attorneys, provided that no such costs and attorneys' fees shall be awarded with respect to any proceeding initiated by plaintiffs to modify the

terms of this injunction. Notice to plaintiffs of any subsequent proceeding shall be served on the American Civil Liberties Union of Washington Foundation, 2100 Smith Tower, Seattle, Washington, or at its current address at the time of such service.

11. Basis for Injunction. Due to the resolution of the injunctive claim in this action by settlement between and among the undersigned parties, it is not necessary to appropriate for this Court to enter specific findings of fact and conclusions of law at this time. The Court is satisfied from the entire record of proceedings in this action that the remedies contained in this stipulated injunction are specifically justified as an appropriate basis and consideration for the resolution of the

claim for injunctive relief in this litigation. The parties agree that this Court has jurisdiction over the subject matter of, and the parties to, this action and that this Court has the authority to grant the relief included in this stipulated permanent injunction.

12. No Admission of Liability. This stipulated injunction is executed by the parties specifically for purposes of resolving plaintiffs' injunctive claim in this action. It is expressly understood and agreed that this stipulated injunction shall not constitute or be construed to be an admission of liability on the part of any of the defendants or as evidencing any admission of the truth or correctness of any other claim asserted,

or of any violation of law alleged, by plaintiffs.

13. Court Approval. It is understood and agreed by the parties that if the Court fails or refuses to approve this stipulated injunction, it shall become null and void and without any force or effect, and none of the parties shall be bound by it.

14. No Appeal. It is further agreed by the parties that upon such approval and entry of this stipulated injunction as an order of the Court, no appeal shall be taken by any party from any portion of this stipulated permanent injunction.

15. Final Judgment. There is no just reason for delay in entry of a final judgment as to plaintiffs' claim for injunctive relief in this action

and, pursuant to Fed. R. Civ. P. 54(b), this stipulated permanent injunction is expressly directed to be so entered as a final judgment.

IT IS SO ORDERED.

DATED this 15th day of November, 1983.

Donald S. Voorhees,
UNITED STATES
DISTRICT JUDGE

Presented by:

PERKINS, COIE, STONE,
OLSEN & WILLIAMS

By _____
M. Margaret McKeown
Eugene C. Chellis
Attorneys for Plaintiff

date: November 8, 1983

AMERICAN CIVIL LIBERTIES UNION
OF WASHINGTON FOUNDATION

Stipulated for entry; notice
of presentation waived:

NORM MALENG
KING COUNTY PROSECUTING ATTORNEY

By _____
Robert I. Stier
C. Craig Parker,
Deputy Prosecuting Attorneys
Attorneys for Defendants

date: November 4, 1983

Approved:

KING COUNTY

By _____
RANDY REVELLE,
King County Executive

date: November 4, 1983

No. 86-1542

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

H. DEAN OLSON, et al.,

Petitioners,

vs.

GLENNELL EXKANO, et al.,

Respondents.

On petition for writ of certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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AMERICAN CIVIL LIBERTIES UNION
OF WASHINGTON FOUNDATION

No. 86-1541

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

H. DEAN OLSON, et al.,

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vs.

GLENNELL EXKANO, et al.,

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No. 86-1541

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESPONSE TO PETITIONER'S STATEMENT OF QUESTIONS PRESENTED

Governmental officials were not in this case "required to anticipate subsequent court decisions" or "required to establish authority affirmatively approving their actions." These questions were

parroted from the certiorari petition in Duffy v. Ward, No. 86-815 (U.S. Nov. 17, 1986), in an apparent attempt to bootstrap this case into consideration along with Ward. Following is more accurate formulation of the issues actually presented here (encompassing the first three questions stated in the petition):

> (1) When at least two federal courts of appeals have decided an issue, may governmental officials rely on the absence of a controlling opinion by the Supreme Court or the court of appeals of a particular circuit as negating the existence of "clearly established" law for purposes of qualified immunity?
>
> (2) When two or more federal courts of appeals and the applicable federal district court have held that a constitutional right exists, may governmental officials rely on a single conflicting opinion, then on appeal, from a different district court, as creating such uncertainty that the law is no longer "clearly established"?

The fourth question urged in the petition--dealing with the scope of immunity

in a class action context--has not been presented or decided below and should not be addressed by this Court on certiorari at an interlocutory stage.

RESPONSE TO STATEMENT OF PARTIES

Qualified immunity is not available as a defense to claims against individuals in their official capacities. See Brandon v. Holt, 469 U.S. 464 (1985); Owen v. City of Independence, 445 U.S. 622 (1980). Consequently, it is uncontested that petitioners' appeal to the Ninth Circuit, and similarly their petition to this Court, are in their personal capacities only, not in their official capacities as officials of King County.

RESPONSE TO STATEMENT OF CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to 42 U.S.C. § 1983, cited by petitioners, this case involves the

fourth and fourteenth amendments to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

U.S. Const. amend. IV.

> . . . No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

RESPONSE TO STATEMENT OF THE CASE

As relevant to the present petition,[1] plaintiffs' claims arise from

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[1]Two named plaintiffs also have claims arising from being booked into the jail and detained even though they had sufficient cash to pay the established bail amounts. Plaintiffs' claims are based in part on the federal Civil Rights Act, 42 U.S.C. § 1983. Other claims are based on the Washington state constitution and common law.

defendants' acknowledged policy and practice in 1983 of indiscriminately conducting routine strip searches of all persons booked into the King County Jail in Seattle, including persons such as plaintiffs who were arrested on minor traffic or misdemeanor charges.[2] The strip search claims are brought on behalf of a class consisting of those persons arrested, booked into the jail and strip searched from May 20 to November 15, 1983, on charges other than burglary or offenses involving violence, use of a deadly weapon or drugs, without any reason to believe that weapons, criminal evidence or other contraband might be concealed. (Amended Complaint ¶ 4.1, at 17.)

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[2]Defendants have expressly admitted that during the relevant time it was their official policy and practice to conduct strip searches of every person arrested and booked into the King County Jail.

Although no written order was signed at the time of the preliminary injunction hearing in the earlier Grew litigation referred to by petitioners, the district court's oral ruling specifically advised petitioners:

(1) "[O]n the merits . . . a routine strip search is an unreasonable search in contravention to the Fourth Amendment to the United States Constitution";

(2) "The standard . . . would not be probable cause, which is a higher standard, but a reasonable suspicion that a strip search is necessary";

(3) "The decision to conduct a strip search should be made by a jail official, concurred in by a jail supervisor with articulated reasons for the search"; and

(4) "I am going to issue a preliminary injunction against routine strip searches in Clallam County and King County . . . . [T]here is a very high likelihood that the plaintiffs on this injunction issue would prevail on the merits, and applying the other standards that I must with respect to the issuance

> of a preliminary injunction, I feel that one must issue."

Transcript of Oral Opinion, Grew v. King County, No. C83-157V (W.D. Wash. May 20, 1983) (Petitioners' Appendix C, at C-2, C-4 & C-5). In plain terms, petitioners were directed to stop conducting indiscriminate booking strip searches without individualized reasonable suspicion. However, petitioners did not stop. It is undisputed that their prior policy of conducting routine strip searches of all persons booked into the King County Jail remained in effect until November 15, 1983.

Since the case was originally filed in state court in Washington and removed to federal court by defendants pursuant to 28 U.S.C. § 1441, the district court's jurisdiction over all claims is derivative, not original as stated by petitioners.[3]

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[3]Other portions of petitioners' statement of the case are also inaccurate, but will not be addressed here.

ARGUMENT OPPOSING GRANT OF CERTIORARI

Review by writ of certiorari is granted only when there are "special and important reasons" to do so. Sup. Ct. R. 17.1. Petitioners have failed to demonstrate that this case meets any of this Court's criteria for granting of certiorari. Apparently conceding that there is no split of authority among the federal circuits and that the Ninth Circuit's ruling in this case does not conflict on a federal question with any state court of last resort,[4] petitioners

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[4]The only other federal appeals court case cited by petitioners as addressing the issue of qualified immunity for indiscriminate booking strip searches of minor offense arrestees, Jones v. Edwards, 770 F.2d 739 (8th Cir. 1985), is consistent with the decision here. Jones held that qualified immunity was not available because fourth amendment protection against routine booking strip searches was "well-established" by 1981. 770 F.2d at 742 n.4. Another case which petitioners cite as inconsistent, Security and Law Enforcement Employees, District Council 82 v. Carey, 737 F.2d 187 (2d Cir. 1984), did not involve minor offense arrestees at all, but rather

urge instead that the decision below is inconsistent with the law of qualified immunity as articulated by this Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982); Davis v. Scherer, 468 U.S. 183 (1984); and Mitchell v. Forsyth, 472 U.S. 511 (1985).

While couched in terms of a critique of the court of appeals' analysis in Ward v. County of San Diego, 791 F.2d 1329 (9th Cir. 1986), petition for cert. filed sub nom. Duffy v. Ward, No. 86-815 (U.S. Nov. 17, 1986), and Capoeman v. Reed, 754 F.2d 1512 (9th Cir. 1985), petitioners' arguments are at heart addressed to the application of that analysis to the facts

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strip searches (during 1977-79) of guards specifically suspected of smuggling drugs and other contraband into prison facilities. Cf. Kirkpatrick v. City of Los Angeles, 803 F.2d 485 (9th Cir. 1986) (strip searches of police officers accused of theft).

There is similarly no conflict of authority among the circuits on the underlying issue of whether strip searches of minor offense arrestees require at least reasonable suspicion.

of this case. The legal standard applied by the courts below was proper and in accordance with applicable decisions of this Court:[5] a determination, based on the law existing at the time, of whether the right alleged to have been violated was clearly established. Since the only issue of general significance beyond the parties to this case--the legal standard--was correctly decided, it would therefore be improvident to grant certiorari simply to review the lower courts' application of that standard to particular facts.[6]

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[5]Under Sup. Ct. R. 17.1, "[t]he mere assertion of conflict with Supreme Court precedent will not suffice. Rule 17 requires that the application of the precedent to the case at bar be clear, and that the . . . federal court of appeals, did not follow that precedent." 13 J. Moore, H. Bendix & B. Ringle, Moore's Federal Practice ¶ 817.45, at SC17-47 (2d ed. 1985).

[6]Cf. Harlan, Manning the Dikes, 13 Record N.Y.C.B.A. 541, 551 (1958) ("The cornerstone of a

Moreover, the standards were properly applied because the specific rights at issue were well-established. Even if this Court were to grant certiorari in Ward and conclude that the unconstitutionality of indiscriminate booking strip searches had not been "clearly established" by 1981, and indeed even if this Court disagreed with the court of appeals' statement of the law in Ward, the decision in this case should nevertheless be allowed to stand because by 1983 there was a substantial and growing body of case law holding booking strip searches to be unconstitutional when conducted on minor offense arrestees without at least some reasonable suspicion justification.[7]

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petition for certiorari in a federal case is a showing that the question to be reviewed is one of general importance." (emphasis in original)).

[7]In addition, in Ward the defendant had been a party to a state court lawsuit in which the

The final issue on which petitioners seek review pertains only to whether there might be some unnamed individual member within the proposed plaintiff class as to which qualified immunity might be applicable. Since no class has been certified by the district court and no such individuals have been identified in the record, this issue is entirely premature.

1. It Was Well-Established by May 1983 That Indiscriminate Booking Strip Searches of Minor Offenders Were Unconstitutional.

Although the Ninth Circuit's cited only one case--Ward v. County of San Diego--in its summary affirmance order, that does not establish that the court considered nothing else in reaching its

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strip search policy had arguably been adjudicated and found to be constitutional. See Petition for Writ of Certiorari at 10-11, Duffy v. Ward, No. 86-815 (U.S. Nov. 17, 1986). In the present case, the county officials have no such defense. Indeed, their strip search policy had been the subject of a federal court suit and ruled to be unconstitutional.

decision. The court of appeals must be assumed to have fully considered the case law authority existing at the relevant time, as discussed in respondents' briefing submitted to that court.

At the time relevant to the Ward case (May 1981), a federal appellate court decision had already established that indiscriminate booking strip searches of minor offender arrestees was unconstitutional. The Seventh Circuit had concluded that, absent "any relation to the likelihood of . . . concealment of weapons or contraband," routine strip searches of traffic offenders was unconstitutionally prohibited. Tinetti v. Wittke, 620 F.2d 160 (7th Cir. 1980), aff'g 479 F. Supp. 486, 491 (E.D. Wis. 1979). In addition, the Second Circuit had described strip searching of pre-arraignment detainees charged with petty offenses as "insensitive, demeaning and stupid." Sala v.

County of Suffolk, 604 F.2d 207, 211 (2d Cir. 1979), vacated & remanded on other grounds, 446 U.S. 903 (1980) (for further consideration in light of Owen v. City of Independence, 445 U.S. 622 (1980)). The only contrary authority was one district court decision upholding a strip search of a woman arrested on a drunk-driving charge. Logan v. Shealy, 500 F. Supp. 502 (E.D. Va. 1980), rev'd, 660 F.2d 1007 (4th Cir. 1981), cert. denied, 455 U.S. 942 (1982).

By the time relevant to this case (mid-1983), there was even more substantial authority that indiscriminate booking strip search policies applied to persons arrested on traffic and other minor offenses were unconstitutional. The Fourth Circuit had reversed the district court's ruling in Logan and directed entry of a permanent injunction. The court held such an indiscriminate search policy was "con-

clusively unconstitutional" under the standards of Bell v. Wolfish, 441 U.S. 520 (1979), because it bore no "discernable relationship" to any possible security justification. 660 F.2d at 1013.[8]

Routine booking strip searches had also been held unconstitutional in a class action suit against the Chicago police. Does v. City of Chicago, No. 79-C-789 (N.D. Ill. Jan. 12, 1982),[9] aff'd sub

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[8]Petitioners' attempt to distinguish Logan on the ground that respondents in the present case were strip searched "preliminary to their transfer to the general jail population," Petition at 20, is without merit. By petitioners' own statements, respondents were in custody only "between three and four hours." Petition at 7. Nothing in Logan or any other case permits officials to circumvent a minor offense detainee's right to be free from unreasonable strip searches simply by unilaterally deciding to place such persons in the same cells with convicted criminals and persons awaiting trial on serious crimes such as robbery or drug dealing. See, e.g., Hill v. Bogans, 735 F.2d 391, 394 (10th Cir. 1984).

[9]Petitioners argue that the Chicago case is of no "precedential value" here because the trial court's decision was unpublished. However, a copy of that memorandum decision was served on petitioners on April 7, 1983 in connection with

nom. Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983). Another court had called strip searches "massive invasions of personal privacy" which "can be tolerated only in the most extraordinary of circumstances." Salinas v. Breier, 517 F. Supp. 1272, 1278 (E.D. Wis. 1981), rev'd on other grounds, 695 F.2d 1073 (7th Cir. 1982), cert. denied, 464 U.S. 835 (1983). Yet another federal court had expressly held that:

> [S]trip searches of temporary pre-arraignment detainees charged with minor offenses not normally associated with weapons or contraband are permissible under the Fourth Amendment only if there is a basis for reasonable suspicion that the particular detainee is concealing a weapon or contraband.

Hunt v. Polk County, 551 F. Supp. 339, 344-45 (S.D. Iowa 1982) (emphasis added).

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the earlier Grew litigation and was relied on by the district court in its oral ruling. (See Petitioners' Appendix at C-4.) It is therefore a matter of record that petitioners were, or should have been, aware of the Chicago decision.

The consistent import of these cases was that jail policies calling for indiscriminate strip searches of all arrestees, including minor offenders and persons arrested on traffic warrants, could not stand. In addition, of course, petitioners' own strip search policy had been expressly rejected as unconstitutional by a federal district court in the Grew litigation.[10]

Again, only a single trial court opinion (which was as-yet unpublished, was then on appeal and has since been unanimously reversed by the Ninth Circuit) was to the contrary. That case, Giles v. Ackerman, 559 F. Supp. 226 (D. Idaho

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[10]Plaintiffs have never argued--and the district court did not rule--that petitioners violated an actual injunction when they continued to enforce their indiscriminate strip search policy after the Grew oral ruling in 1983. What petitioners did do was to ignore the court's ruling and warning.

1983),[11] rev'd, 746 F.2d 614 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985), simply ignored the case law on point--the opinion did not even discuss either of the prominent cases, Tinetti or Logan--and relied instead on cases dealing with searches of convicted prisoners or persons in situations where there was probable cause to search.[12]

In contrast to Mitchell v. Forsyth, 472 U.S. 511 (1985), in which the only direct precedents at the time of the challenged action were two district court

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[11] In 1983 the Giles trial court decision was obviously not a Ninth Circuit precedent as petitioners suggest.

[12] Roscom v. City of Chicago, 570 F. Supp. 1259 (N.D. Ill. 1983), cited by petitioners, is similarly inapposite. Roscom involved a plaintiff who was strip searched the day after being arrested--after a preliminary court hearing, failure to post bail and transfer to a second jail facility. The county policy at issue in that case permitted strip searches only on a "reasonable cause" basis or on transfers to or from high-security-risk areas.

cases upholding the practice at issue as constitutional, the overwhelming authority in mid-1983 made clear that petitioners' strip search policy in this case would have to be changed. Petitioners "gambled and lost," not that an open question would be resolved in their favor, but on the objectively unreasonable hope that the Ninth Circuit or Supreme Court would completely reverse the line of developing case law.

2. The Court of Appeals Has Applied the Appropriate Legal Standards in This Case and in Ward.

This Court's "clearly established" test for determining qualified immunity "focuses on the objective legal reasonableness of an official's acts." Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (emphasis added). Neither Davis v. Scherer, 468 U.S. 183 (1984), nor Mitchell v. Forsyth, 472 U.S. 511 (1985), eliminate

the requirement that the official's actions be objectively reasonable.

The standard utilized by the Ninth Circuit for determining whether the law is "clearly established" under Harlow was entirely consistent with this Court's rulings: If there is direct, binding precedent in a decision by the Supreme Court or the circuit, then that precedent is deemed to "clearly establish" the law. If there is no such binding precedent, then a court considering a qualified immunity issue is to "look at all available decisional law including decisions of state courts, other circuits, and district courts to determine whether the right was clearly established." Ward, 791 F.2d at 1332; see also Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985).

This "survey [of] the legal landscape," see Ward, 791 F.2d at 1332, is precisely the determination of the law on

the dates in question that petitioners argue is required by Mitchell v. Forsyth, 472 U.S. 511 (1985). It is not a "subjective" or "hindsight" analysis for a court to look at the available body of case law at a given time. Nor does the mere existence of any conflicting precedent or the lack of a definitive Supreme Court decision automatically preclude a finding of clearly established rights and guarantee qualified immunity for defendants. See, e.g., Bilbrey v. Brown, 738 F.2d 1462, 1466 (9th Cir. 1984). The Ninth Circuit has made clear that "[a] reasonable person standard adheres at all times." Ward, 791 F.2d at 1332; see also Chilicky v. Schweiker, 796 F.2d 1131, 1138 (9th Cir. 1986). This is precisely the same standard mandated by this Court.

3. The Petition Does Not Support the Questions Said to Be Presented.

Petitioners assert that they were required by the courts below to "speculate" as to subsequent legal developments, see Petition at 15-16, and to "establish affirmative authority in support of their actions," see Petition at 23, to obtain qualified immunity. These assertions--patterned after the petition for certiorari in Duffy v. Ward--are simply not supported by the facts of this case.

Petitioners focus on one isolated passage from the court of appeals' Ward opinion, a reference to consideration of "the likelihood that the Supreme Court or Ninth Circuit would have reached the same result as courts that had already considered the issue" as a "factor" in determining whether a right was "clearly established" in the absence of direct binding precedent. See 791 F.2d at 1332.

Such consideration does not require clairvoyance on the part of public officials; it merely does not allow officials to ignore established case law simply because they are not directly bound. The court of appeals' reference in Ward to the Ninth Circuit's Giles v. Ackerman decision--which was subsequent to the search at issue in Ward--was not the basis of the Ward holding. The discussion of Giles was merely in the context of demonstrating that there was nothing in 1981 to suggest that the Ninth Circuit would hold otherwise than had already been made clear by decisions of other courts.

Astonishingly, petitioners also attempt to turn the district court's oral ruling against indiscriminate strip searches in Grew into a reason for not knowing that such searches were unconstitutional. There was, however, no need for them to divine the exact terms of an eventual

written injunction in order to know that their policy of conducting routine booking strip searches without any reasonable cause or suspicion was constitutionally impermissible. The trial court's language was clear: "a routine strip search is an unreasonable search in contravention to the Fourth Amendment." Petitioner's Appendix at C-4.

Similarly, petitioners never explain how they were, assertedly, "required to establish affirmative authority" in support of their position in order to be entitled to qualified immunity. Certainly neither the district court nor the Ninth Circuit (in this case or in Ward) said that petitioners were required to do so. Petitioners attempted to raise the district court Giles decision as affirmative authority, but the courts below properly rejected that case as insufficient to

negate the clear authority of existing federal appellate decisions.

4. Petitioners' Argument That the Strip Searches of Some Members of the Class May Have Been Constitutionally Permissible Was Not Properly Presented Below.

Petitioners' only motion in the district court sought immunity from all strip search claims, including those on behalf of the named plaintiffs and other members of the proposed class who were concededly arrested on traffic or other petty offenses. Petitioners complain that they have been "rendered . . . potentially liable for strip searching persons . . . concerning whom such searches have been found constitutional." See Petition at 32 (emphasis added). However, the proposed class consists only of those persons for whom the circumstances of the arrest were insufficient to constitute reasonable suspicion and the jail officials had no other specific facts to justify a strip

search. Nothing in the petition in this Court or in the record below identified any persons "arrested on charges commonly associated with contraband" or "who had been found actually attempting to smuggle contraband into the jail." See Petition at 32-33.

Petitioners have simply never sought qualified immunity specifically for searches of particular individuals, or even specific categories of persons. The courts below thus have never had occasion to address whether qualified immunity could be invoked with respect to the searches of any particular arrestees, or indeed whether any such searches may have been constitutionally permissible. These arguments should first be presented to the district court in defining the class or appropriate subclasses in connection with

the pending motion for class certification.[13] The issue certainly does not warrant interlocutory certiorari review by this Court.

CONCLUSION

Petitioners apparently hold the mistaken belief that exactly the same issue, in exactly the same circumstances, must have been previously decided, by a court whose decisions are binding precedent, before a right can be said to be "clearly established." As this Court's previous decisions make clear, the standard for qualified immunity is the reasonableness of the public official's actions, an objective test measured against the law as it existed at the time. The court of appeals and the district court both

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[13]A class certification motion was filed in the district court in February 1986 but has been stayed pending the interlocutory appeal.

applied the proper standard and determined, correctly, that petitioners did not act in an objectively reasonable manner by continuing to conduct arbitrary, indiscriminate routine booking strip searches in the face of a federal judge's direct instruction to them to stop and multiple federal appellate court decisions directly on point. One poorly-reasoned district court decision to the contrary and the mere absence of a direct Ninth Circuit or Supreme Court precedent were insufficient to make petitioners' actions reasonable.

By 1983, petitioners knew or should have known that continued indiscriminate booking strip searches, conducted regardless of the offense or circumstances, were unconstitutional. Nevertheless, they made absolutely no attempt to apply any criteria for determining when strip searches were reasonably necessary.

Respondents in this case were arrested in connection with only minor traffic charges. Petitioners do not, indeed, could not, assert there was any reasonable good faith grounds to believe any specific cause existed to search these particular individuals.

There is no "maze" to untangle. Cf. Petition at 27. Petitioners did not even attempt to conform their conduct to the law they should have known, and in fact did know, at the time. Consistent with the established law of other circuits and of this Court, the decision below denied qualified immunity. Any other result would mark a radical departure from the present law of qualified immunity and would leave public officials free to disregard constitutional rights with impunity, virtually without regard to the relevant case law, unless the specific

question at issue had been decided by the Supreme Court.

The petition for writ of certiorari should be denied.

DATED: April 23, 1987.

Respectfully submitted,

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